UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FRED I. MERRILL, INC., Plaintiff	)	
v.	)	Civil No. 88-0321 P
THE TRAVELERS COMPANIES, Defendant	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this diversity action, the plaintiff, a subcontractor, seeks to recover attorney's fees and costs it incurred in defending against counterclaims asserted in a separate action concerning which its own insurer, the defendant, refused to defend or indemnify. Before the court are cross-motions for summary judgment.[1]

The plaintiff was a named insured of a comprehensive general liability insurance policy issued by the defendant. While the policy was in effect, the plaintiff was involved as a subcontractor in the construction of a precast concrete baseball stadium at Old Orchard Beach. In time, the plaintiff initiated a mechanic's lien action against the owner of the ballpark and the general contractor to recover amounts allegedly due for its work. In response, each defendant asserted a counterclaim. The owner alleged, inter alia, that the plaintiff:

> defaulted in numerous ways on [its] obligations under [its subcontract with the general contractor and amendments thereto], said defaults including but not limited to a failure to personally supervise stadium work on a regular basis; a failure to obtain lien waivers from subcontractors; a failure to obtain

[1] The defendant has not filed a written objection to the plaintiff's motion. See Local Rule 19(c). Consequently, it is deemed to have waived objection to the plaintiff's factual assertions. McDermott v. Lehman, 594 F. Supp. 1315, 1321 (D. Me. 1984). The defendant's waiver notwithstanding, I do not accept as true the facts contained in the plaintiff's Supplemental Statement of Material Facts because they are not supported by appropriate record citations. Local Rule 19(b)(1).

> architects' signed statements that the construction proceed in accordance with drawing specifications; being in default of payment on any bills submitted to Plaintiff for payment; a hindrance and prevention of completion of work by [the general contractor] and other subcontractors; absence from the job site without cause; a failure to adhere strictly to the work schedule; and a failure of subcontractors working under Plaintiff to adhere to work schedules,

and further alleged that these defaults constituted material breaches of the subcontract, as amended, and a breach of the plaintiff's implied warranty of workmanlike performance.

The general contractor alleged in its own counterclaim, inter alia, that the plaintiff:

> defaulted in numerous ways in [its] obligations under the contract, as amended, and also [was] in breach of [its] contract in the following ways:
>
> a. Failure to adequately supervise the stadium work.
> b. Failure to obtain lien waivers from subcontractors.
> c. Failure to proceed in accordance with plans and specifications.
> d. Failing to pay subcontractors and suppliers in a timely fashion.
> e. Failing to complete the project in a timely fashion.
> f. Failing to perform in accordance with reasonable standards of good workmanship.
> g. Failure to complete punch list and other incomplete work and to remedy defective work.
> h. Failure to meet a reasonable progress schedule.

Several policy provisions are necessarily involved in the determination of the pending motions. The general liability coverage provision provides, in relevant part, that:

> The Company will pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages because of
>
> Coverage A - bodily injury or
> Coverage B - property damage
>
> to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage . . . .

"Occurrence" is defined as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured.

"Property damage" is defined as follows:

> "Property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss or use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Exclusions (a), (n) and (o) appear in the policy as follows:

> Exclusions -- This insurance does not apply:
>
> (a) to liability assumed by the Insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the Named Insured's products or a warranty that work performed by or on behalf of the Named Insured will be done in a workmanlike manner;
>
> . . .
>
> (n) to property damage to the Named Insured's products arising out of such products or any part of such products;
>
> (o) to property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

The defendant argues that it was under no obligation to provide a defense to the counterclaims because they describe "economic damage" rather than "property damage" as required by the policy, and because they do not describe an "occurrence" as defined in the policy. The plaintiff contends that proper application of Maine's so-called "comparison test" compels a finding in its favor on the duty to defend question.

It is well settled that the duty of an insurer to defend is broader than its duty to pay or indemnify. American Policyholders' Insurance Co. v. Cumberland Cold Storage Co., 373 A.2d 247, 250 (Me. 1977). Whether an insurer has a duty to defend is determined by comparing "the underlying damage complaint to the insurance policy . . . to determine if the complaint alleges an occurrence

within the coverage of the policy." Merrimack Mutual Fire Insurance Co. v. Brennan, 534 A.2d 353, 354 (Me. 1987), citing Travelers Indemnity Co. v. Dingwell, 414 A.2d 220 (Me. 1980). The pleading test is based "exclusively on the facts as alleged rather than on the facts as they actually are." American Policyholders' Insurance Co. v. Cumberland Cold Storage Co., 373 A.2d at 249 (emphasis in original).

It is not necessary that the pleading allege specific facts which, if proved, would bring the action within the coverage of the policy. Recognizing the inherent nature of modern notice pleading and the inability of a defendant to amend a complaint which contains an incomplete statement of facts, the Law Court has held that a duty to defend exists so long as the complaint "discloses a potential for liability within the coverage and contains no allegation of facts which would necessarily exclude coverage." Travelers Indemnity Co. v. Dingwell, 414 A.2d at 227 (emphasis in original). Stated otherwise, "[i]t is sufficient, for the purpose of determining the insurer's duty to defend, that the . . . complaint raise[s] the possibility that the liability claim would fit within that language." Union Mutual Fire Insurance Co. v. Inhabitants of the Town of Topsham, 441 A.2d 1012, 1015 n.1 (Me. 1982).

An examination of the counterclaims in the underlying action reveals that they do disclose a potential for liability within the coverage. It is true that none of the enumerated defaults contained in each counterclaim includes a specific allegation of an occurrence within the meaning of the policy. However, in both cases the enumerations are preceded by general allegations of numerous, unspecified contract defaults which, in the context of the entire action, including the plaintiff's main subcontractor mechanic's lien action, give rise to the possibility that at least one of such defaults was based on at least one accident, including continuous or repeated exposure to conditions, which resulted in property damage neither expected nor intended by the plaintiff. Moreover, the allegations contained in the owner's counterclaim that the plaintiff breached its implied warranty of workmanlike performance and in the general contractor's

counterclaim that the plaintiff failed to perform in accordance with reasonable standards of good workmanship may possibily have evolved from a covered occurrence,[2] just as allegations of the contractor's alleged breach of implied warranties of workmanlike performance and fitness for a particular purpose derived from a specifically alleged roof collapse in Baybutt Construction Corp. v. Commercial Union Insurance Co..

[2] In its memorandum, the plaintiff has detailed a number of specific facts which it claims underlay, but which are not specifically contained in, the counterclaims in support of its argument that the counterclaims presented the possibility of property damage and an occurrence. The Maine "comparison test" does not permit the insurer or the court to look behind the allegations of the pleading in evaluating a duty to defend claim, see Travelers Indem. Co. v. Dingwell, 414 A.2d at 227, and I have not done so here. In any event, as noted earlier, the plaintiff's predicate facts, even if material, are not properly asserted for summary judgment purposes. See n.1, supra.

The final determination to be made is whether the counterclaims contain allegations of facts which would necessarily exclude coverage.[3] Although in Baybutt the Law Court was not concerned with whether there was an accident since the roof collapse was specifically pleaded, it did address the broad question of coverage for purposes of deciding whether the insurer owed the insured a duty to defend. The Baybutt court focused on standard exclusions (n) and (o), which are part of the policy in issue here (see supra p. 4), and concluded that, when read together with the limitation attached to exclusion (a) (id.), they create an ambiguity as to whether the exclusions or the limitation to exclusion (a) prevails in the case of breaches of warranty for defective materials and workmanship. Baybutt, 455 A.2d at 920. Applying established principles of insurance contract construction law, the court indicated that it would construe the exclusions strictly against the insurer and liberally in favor of the insured:

> so that the comprehensive general coverage afforded by the policy will be "excluded" by virtue of the operation of separate clauses of exclusion only where such separately stated "exclusions," when viewed as a whole, unambiguously and unequivocally negate coverage.

Id. at 921 (emphasis in original). It then held that:

> the language of this policy, construed as a whole, might reasonably be read by the ordinary intelligent insured, including ordinary business people in the construction field, as providing coverage for liability in breach of warranties of the type suffered in the instant

[3] In connection with both pending motions for summary judgment, the defendant has limited itself to the argument that the counterclaims do not allege an occurrence within the meaning of the policy. For the foregoing reasons, I would deny the defendant's motion for summary judgment without more. However, because the plaintiff also seeks summary judgment, limited to liability, the exclusion provisions of the policy must also be examined in order to determine if the counterclaims contain any allegations which would necessarily exclude coverage.

> case . . ., notwithstanding that the insurance company through its sophisticated use of a complex structural format may have intended and considered them to be excluded.

Id. at 922. Baybutt inescapably compels the conclusion that exclusions (n) and (o), although in and of themselves seemingly determinative in a construction case such as this, do not constitute a basis for excluding coverage based on the breach of warranty claims specifically asserted in both counterclaims. My review of the other policy exclusions reveals none which would otherwise extend to and foreclose these breach of warranty claims.

Accordingly, I recommend that the defendant's motion for summary judgment be DENIED and that the plaintiff's motion for partial summary judgment (on liability) be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 25th day of May, 1989.

David M. Cohen
United States Magistrate